# BRIEF OF THE PLAINTIFF IN ERROR.

Filed Oct. 31, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 187.

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THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, PLAINTIFF IN ERROR,

vs.

H. P. CHAPMAN, AS TREASURER OF LORAIN COUNTY, OHIO.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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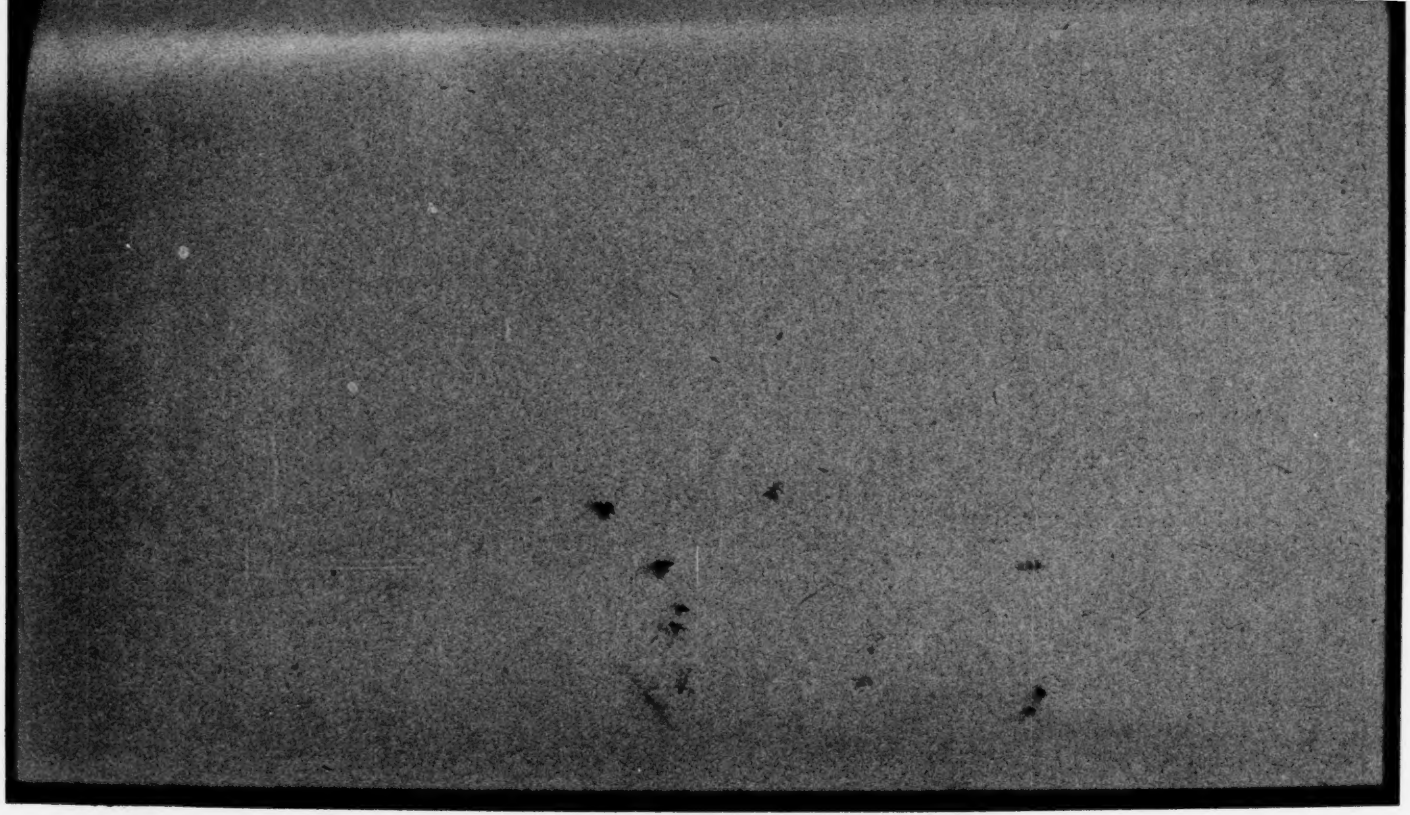
W. W. BOYNTON,

PLAINTIFF'S SOLICITOR.

(16,630.)



# In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO,

vs.

H. P. CHAPMAN, as Treasurer of Lorain County, Ohio.

BRIEF OF PLAINTIFF IN ERROR.

## STATEMENT OF FACTS.

The question to be decided in this case is whether the owner of National Bank shares in Ohio is entitled, by virtue of Section 5219 of the Revised Statutes of the United States, to deduct his legal bona fide debts from the assessed value of his shares for taxation, or to reduce their valuation for taxation to the extent of his bona fide indebtedness. The original action was brought by the plaintiffs in error, The First National Bank of Wellington, Ohio, to enjoin the defendant, Chapman, as Treasurer of Lorain County, Ohio, from collecting a tax assessed on the shares of several of its stockholders on the ground that each of said shareholders was owing on the day preceding the second Monday of April, 1893, legal bona fide debts to an amount equal to the value of the shares over and above all other credits from which under the laws of Ohio, he was entitled to make deduction of said debts. The bank alleged that under the laws of Ohio owners of personal property had the right in making out the return of their property for taxation to deduct their legal bona fide debts from their credits under Section 2730 of the Statute of Ohio which defines "credits" to mean,

"The excess of the sum of all legal claims and demands whether for money or other valuable thing, or for labor or services due, or to become due, to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state other than such as are held to be money, as hereinbefore defined when added together, estimating every such claim or demand at its true value in money, over and above the sum of legal bona fide debts owing by such person."

It also alleged that such provision allowing such deduction of debts from credits wrought an unjust discrimination against moneyed capital invested in national bank shares, as to which no exemption was provided by the Statutes of Ohio, in violation of Section 5219 of the Revised Statutes of the United States, which in authorizing the taxation of such shares by the State, provides

"That the taxation of such shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

The Court of Common Pleas made a special finding of facts, substantially as claimed by the bank, but held that the bank shares were not credits within the meaning of the Ohio Statute, and refused to enjoin the collection of the tax thereon.

The Circuit Court on error reversed the judgment of the Court of Common Pleas, and perpetually enjoined the collection of the tax. The Supreme Court of Ohio reversed the judgment of the Circuit Court, and affirmed the judgment of the Common Pleas.

The sixth and seventh findings of the Court of Common Pleas were as follows:

"Sixth. That on the said day next preceding said second Monday of April, 1893, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the shareholders of said association, with the numbers and par value of the shares of capital stock of said banking association for the year 1893, to-wit: between the first and second Mondays of May of said year, each of said above named shareholders *was indebted and owing to others of legal bona fide debts a sum in excess of the credits, from which under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares.* That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares of stock was so fixed by him, and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares as so fixed by said board of equalization, and the auditor of said county carried upon the duplicate so made without allowing any deductions therefrom by reason of any bona fide indebtedness of said shareholders to others, from the valuation so fixed by said board of equalization.

Seventh. That the plaintiff tendered to said treasurer of Lorain county on the 28th day of December, 1893, and offered to pay to said treasurer the sum of $485.80, if he would received the same in full for the tax assessed upon the valuation of the shares of stock owned by the shareholders named in the petition for the entire year of 1893, and said treasurer refused to acccept the same, and said treasurer intends, if not enjoined by this court to use all lawful means for the collection of said tax so assessed upon the valuation of said shares of stock.

The sections of the Ohio Statute bearing on the question involved are as follows:

SEC. 2730. In this title, the terms "real property" and "land" shall be held to mean and include not only land itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures, and improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or in anywise appertaining thereto; the terms "investment in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others; the terms "investments in stocks," shall be held to mean and include all moneys invested in the capital or stock of any association, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state, either for themselves or others; the terms "personal property," shall be held to mean and include, first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel or real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means, by whatsoever name the same may be designated, inclusive of every share or portion, right, or interest, either legal or equitable, in and to every ship, vessel or boat, of whatever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this State, whether such ship, vessel or boat, shall be within the jurisdiction of this State or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office, or within any collection district in this state or not; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely; the term "money" or "moneys," shall be held to mean and include any surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand; the term "credits," shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal bona fide debts owing by such person; but in making up the sum of such debts

owing, there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any aknowledgment of any indebtedness unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound, and will be compelled to pay, or to contribute, in case there be no securities; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits, a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease and remain unpaid; words importing the masculine gender shall apply to females also, and the word "person" or "party," or other word importing the singular number, shall be held to include firms, companies, associations, and corporations: and all words in the plural number shall apply to single individuals also in all cases in which the spirit and intent may require it.

SEC. 2746. Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company.

SEC. 2737. Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second; the number of neat cattle, and the value thereof; third, the number of mules and and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages (of whatever kind), and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the nnmber of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise, which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stockjobber; twelvth, the average value of the materials and manufactured articles, which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other

securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statements may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items.

I.

## ARGUMENT.

It will be noticed that the taxable property of Ohio is primarily classified by Section 2730 above cited, into real estate and personal property, personal property being further divided and classified into tangible things animate or inanimate, "investmens in bonds," "investments in stocks," "money or moneys," and "credits."

It will be further noticed that all intangible property, or legal claims and demands of every conceivable kind, are defined to be "credits," except investments in bonds of the classes described in Section 2730, some of which are non-taxable, and investments in stocks, and that investments in bonds of the classes defined by the section, are the only choses in action, or legal claims, and demands that are not denominated credits.

All conceivable moneyed obligations, except government, municipal and company bonds, are credits from which *bona fide* debts of the owner are deducted in fixing their value for taxation.

The question, therefore, before the Court, a question heretofore carefully considered by this Court and its judgment given thereon in *Whitbeck* vs. *The Mercantile National Bank, of Cleveland*, 127 U. S. 193, on the precise state of facts here existing, is, do credits in Ohio constitute relatively such a material portion of the moneyed investments or capital in the hands of individual citizens of the state, as to cause by their exemption from taxation, without a like exemption of National Bank shares, a violation of the restriction above recited from Section 5219 of the Revised Statutes of the United States; such section authorizing the taxation of National Bank shares by the State, but not at a greater rate than that imposed on other moneyed capital in the hands of individual citizens of the State. It will be our purpose to show, after reviewing the decision of the Supreme Court of Ohio, that the moneyed capital invested in credits in Ohio actually reported for taxation and irrespective of a vast amount from which debts are actually taken, is more than double that of all other kinds of moneyed capital as that term has been defined by this Court; and that the same

exceeds in amount all other moneyed investments in the State added to all its money returned for taxation. Before this, however, we invite the attention of the Court to an analysis of the decision of the Supreme Court of Ohio.

## REVIEW OF THE DECISION OF THE SUPREME COURT OF OHIO.

The proposition announced by the Supreme Court of Ohio in deciding the case below, reversing the judgment of the State Circuit Court, as stated in the syllabus of the case is as follows:

"In the administration of our tax laws, the holder of National Bank shares has no right under the statutes, State and National, to deduct his legal bona fide debts from the value of such shares, but he is legally bound to pay taxes upon the assessed value of such shares without deduction on account of such debts." (56 O.S., 310, Record p. 19.) This holding covered and was intended to cover the entire question of the right to deduction of debts from the value of National Bank shares, and to plant the Court squarely against this Court's judgment in *Whitbeck* vs. *The Mercantile National Bank*, *supra*, which gave construction to the same statutes; and also against the judgment of this Court in other cases involving the same legal question. The judgment of the Supreme Court of Ohio not only antagonizes a carefully considered judgment of this Court in which all its members concurred given on legislation unchanged in any particular, and on a question exclusively federal in its nature, but the Court by this decision reverses itself.

In *Miller, treasurer*, vs. *First National Bank*, 46 O. S. 430, the court say:

"Unless the shares are assessed for taxation in the names of the shareholders, there would be no opportunity given a shareholder to have a deduction in his favor for any *bona fide* indebtedness on his part; and to which he would be entitled under the decisions in *Whitbeck, treasurer*, vs. *Mercantile National Bank*, 127 U. S. 193-199; *Hills* vs. *Exchange Bank*, 105 U. S. 319; *Supervisors* vs. *Stanley, Id.*, 305."

After reciting the state statutes defining the various classes of property both real and personal, the Court in its opinion, (record, page 25,) says:

"A credit is defined in short to be what is owing to a person over and above his legal *bona fide* debts, but in making up what is owing to him he cannot include moneys, bonds, stocks, or deposits subject to withdrawal on demand, and he cannot deduct his legal *bona fide* debts and obligations to a mutual insurance company, nor an unpaid

subscription to the capital stock of a joint company, nor to any religious, scientific, literary or charitable purpose, nor any acknowledgment of any indebtedness, unless founded on full consideration, nor an acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation, nor any greater amount as surety that he is likely to be compelled to pay, nor any indebtedness created in the purchase of non-taxable securities. It will be noticed that there is a large class of indebtedness that cannot be deducted from the credits and to fairly enable the bank to raise that question in this case, it should show that the debts sought to be deducted, were of the class that our Statute allows to be deducted from credits, *and that such deductions were generally made by others to an extent that materially affected the said share-holders financially.*"

Here the Court say two things are required to enable the bank fairly "to raise the legal question," when they obviously mean that the bank must establish two facts in order to obtain judgment; the two facts being, that the debtswere of a kind that did not include obligations to any mutual insurance company, nor an unpaid subscription to the capital stock of a joint stock company; nor to any religious, scientific, literary or charitable purpose and the like. And, secondly, that the bank must show that the deductions were allowed to others by the statute, and that such allowed deductions were *actually made* to an extent that materially affected the bank shareholders financially. As to the first of these propositions, the finding of the trial court (record page 10), is that on the day fixed by the statute as the one determining the property to be listed, and on which a lien attaches to real estate for the taxes levied thereon for that year.

"Each of said above named shareholders was indebted and owing to others of *legal bona fide debts* a sum in excess of the credits from which under the laws of Ohio, he was entitled to deduct *said debts* to an amount equal to the value of said shares; that proof of *said indebtedness* was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares was so fixed by him, and that the auditor refused to allow the deduction *of any indebtedness of said shareholders from the value of said shares.*"

This finding followed the language of the statute, and was understood by counsel on both sides to be sufficiently definite to raise the question of the right to the deduction. But, we submit, that it is in technical compliance with the statute when the statute is carefully examined and its true meaning ascertained. The statute does not say that legal bona fide debts, less debts to a mutual insurance company, and debts arising out of subscriptions for religious and charitable purposes and the like, may be deducted from credits. It says that legal bona fide debts *may be deducted*; but that *in making up the sum*

*of the legal bona fide debts* to be deducted, debts created by charitable subscriptions and other similar indebtedness, must be excluded. When the trial court found that the shareholders were indebted and owing to others of *legal bona fide debts* a sum in excess of their credits, from which, *under the laws* of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, and that proof of said indebtedness was duly made to the auditor, it is perfectly obvious that it meant the class of debts which the statute permitted to be taken from credits, in other words, legal bona fide debts from which had been excluded such particular obligations as were by the statute required to be excluded. And such was the interpretation of the Attorney General who argued the case in the Supreme Court of Ohio. In his brief in that court, p. 35, he said—"Section 2730 defines credits to mean "the excess of the sum of all legal claims and demands, whether money or other things of value, over and above the sum of legal bona fide debts owing to such person." Under the statute, legal bona fide debts, *ex vi termini*, mean the debts made up as the statute requires legal bona fide debts to be made up, as credits are declared to be the *excess* of legal claims and demands over debts *so made up*. In using that term in the finding, it was employed in the same sense as used by the Supreme Court of Ohio in *Treasurer* vs. *Bank*, 47 O. S., 522. There commenting on the definition of credits made by the Statute, and of the right of an unincorporated bank to the deduction, it said:

"Acquiescing in the meaning of the term as thus settled by statute, the amount of the credits of the defendant to be placed on the duplicate for taxation, will be the excess of all its legal claims and demands over and above its *bona fide debts;* in other words, its credits will be estimated by deducting *such* debts from its legal claims and demands."

Here no other characterization is given to the debts which the statute authorizes to be deducted from credits than the term "legal bona fide debts." Within the meaning of the statute, charitable obligations and the like are not legal bona fide debts.

Such was the meaning given to the finding by counsel for the Treasurer as well as by counsel for the bank, and such was the meaning of the Court finding the fact. The point that the finding did not more specifically define the debts embraced with the term, "legal bona fide debts" was not taken by counsel at any time or in either Court. It was throughout treated as a finding of the existence of the statutory indebtedness authorized to be deducted from credits. The objection of insufficiency in the finding was first brought to notice in the opinion of the Supreme Court of Ohio.

In view of this fact, we believe we are justified in bringing to the attention of the Court here, what opposing counsel conducting the

trial of the case in the Common Pleas Court will readily admit to be true, that at the trial, when proof was being offered of the specific indebtedness of each of the shareholders evidenced by promissory notes given for money borrowed, its progress was stopped by the admission in open court by counsel for the treasurer of the fact of the indebtedness, he stating his reliance to be on the fact that the bank shares were not credits. The case then proceeded with the argument of the legal question. The finding as drafted, was intended and supposed to meet the requirement of the statute, and so treated throughout, and we submit should be so regarded here.

The second proposition above stated, as a predicate for the conclusion reached, that it was the duty of the bank to show that persons authorized to make deductions of debts from credits exercised the right to such extent as to materially affect the shareholders of the bank financially, we most respectfully deny. The entire reasoning of the Court on this point proceeds upon the false assumption, that if, in a given year there happens to be no credits from which deductions can be made, or no debts to be taken from credits, in the particular community where the bank is located; or if persons entitled to make deductions refrain from so doing, then the debts of the shareholder cannot for that year be deducted from the value of the shares, although the statute allows the same where both credits and debts in fact exist, and the right to deduct is exercised. The right of one citizen is made to depend on the exercise of a similar right by another. That we do not misapprehend, and therefore misinterpret the Court's meaning, or that the statement was not a mere slip of the pen, we quote a further passage from the opinion. It is said: (record p. 26).

"The Court cannot presume in the face of this record that any deductions of debts from credits were made by individual citizens in the year 1893."

And at page 25:

"The petition avers that a large amount of moneyed capital in the hands of individual citizens of said State and County invested in promissory notes and other legal obligations, securities, claims and demands, is by allowing deduction of legal bona fide debts to be made therefrom exempted from taxation. But this averment is denied in the answer, and the Court does not find it to be true. So that for aught that appears in the finding of facts by the Court, *there was no deduction of debts made from credits either in the state or county*, and the only effort that was made to have such deduction so far as this record shows, was the effort on the part of these eight shareholders, and that was successful."

We remark in passing, that we did not suppose that a statement in the petition that a large amount of moneyed capital in the hands

of individual citizens of the state invested in promissory notes and other legal obligations, securities, claims and demands, was exempt from taxation by the allowance of the deduction of legal bona fide debts therefrom, would be seriously considered as stating a fact requiring any proof for its establishment other than a simple reading of the statute. That it is only the statement of a legal conclusion from the Ohio Statutes, which might well have been omitted, is perfectly obvious. Yet because of the failure of the trial Court to find the averment to be true from proof disclosed by evidence given at the trial, the conclusion is reached that there were no actual deductions of debts from credits, either in the county or state. The Court in effect denies that the laws of Ohio allow a deduction of bona fide debts from moneyed capital invested in promissory notes, and "other legal obligations, securities, claims and demands," unless an unnecessary averment of the fact is proved by evidence adduced at the trial, when the only way to prove the fact would be to put the statute in evidence, a mode of proof clearly in admissible, as the Court takes judicial notice of what the statute contains.

The question, however, is, to what extent *do the laws of Ohio permit or allow exemption* from taxation of moneyed capital in the hands of individual citizens of the state through deduction of debts from credits otherwise taxed. It is not of the slightest consequence whether the right of deduction be exercised or not. The right of one citizen cannot be made to depend on the assertion of, or failure to assert, a like right by another. The act of Congress says to the State, you may tax bank shares to the same extent that your legislation *requires* the taxation of the moneyed capital of individuals. To the extent that moneyed capital is relieved from taxation, to the same extent shall national bank shares be relieved. This is the plain and obvious meaning of Section 5219 of the Revised Statutes of the United States. Were the position of the court below at all tenable, the result would be that bank shareholders could deduct their debts from the value of their shares in localities where debts are in fact taken from credits by individuals, while in other communities having no debts, or credits, in the particular year, bank shareholders would be denied the privilege. The absurdity of this position is so apparent from its mere statement, that no argument can make it more obvious. If, however, it were at all necessary that deductions appear, of such fact, courts take judicial notice. In the varied and manifold business enterprises carried on in a commercial and manufacturing state, that money is borrowed in large amounts with which to carry them forward, is a fact within the knowledge of all intelligent men, and a fact of such character that its existence is to be at once assumed as a matter of common knowledge. The Supreme Court of Indiana, in a case involving the question

whether a material portion of moneyed capital of the state was invested in credits, after enumerating a large number of contracts which were credits, within the meaning of the Statute, of that state, called "second division," said:

"To hold in the case before us that it was necessary to aver and prove that the above second division of the moneyed capital constitutes a large and material part of the whole moneyed capital of the State, would be to hold that the Court cannot know what must be known to the mass of the people, and what any intelligent person would be reluctant if not ashamed to confess he does not know." *Wasson, Treasurer*, vs. *The First National Bank of Indianapolis*, 107 Ind., 221.

This language is quite as applicable to the question whether debts are actually taken from credits in the assessment of the latter for taxation. That deductions are actually made in large volume is a matter of common knowledge among all business men. The holding of the Supreme Court of Indiana, that such credits constituted a large part of the moneyed capital of the state, was said of a class of credits, all of which and many more exist in Ohio.

See in re Duncan 139 U.S. 457
+ Jones v. No. S. 137 U.S. 216

II.

Again, the Supreme Court of Ohio, instead of comparing the taxable credits of 1893, as shown by the official report of the State Auditor with that of other moneyed capital, or with intangible property of any kind shown by the same report, in order to ascertain whether a material portion of moneyed capital was exempt from taxation by the process of deducting debts from credits, made its comparison, drawing its information from the same report, with all the taxable property in the state *both real* and *personal*. At page 26 of the Record, the Court says:

"It appears from Sections 2730 and 2737, that the taxable property of the state is classified as follows: That from which no deductions can be made, and that from which certain legal bona fide debts may be deducted. The former consists of real estate * * * * * * * * * and also some personal property, such as horses, cattle, etc. * * * * * * capital employed by a banker, stock broker, money on hand or on deposit, subject to order, bonds, stocks, etc. and other personal property other than credits, and amounting in the whole state as shown by the official record for the year 1893, to $1.636,000,000. That from which bona fide debts may be deducted consists of credits alone, but money on deposit subject to order cannot be counted as credit, and credits in the state subject to taxation in the year 1893 as shown by the official records, amounted to $106,000,000.

The Court then proceeds to enumerate the property that is free from taxation, such as school-houses, colleges, academies, Churches, property belonging to the State and the United States, County buildings, poor houses, &c., and then closes the discussion of the point by saying:

"It thus appears that credits from which certain debts may be deducted form but a small and comparatively insignificant part *of our taxable property*."

That is to say, $106,000,000 is but a small and comparatively insignificant part of the *grand duplicate valuation* of real and personal property amounting to $1,636,000,000. Although having before it the exact information of the value of all personal property, including credits, and other moneyed capital returned for taxation, found in the same official report referred to for the ascertainment of the value of all taxable property, the Court makes not the slightest allusion to the amount, or value, of personal property returned, and noticeably none of the "moneyed capital" returned with which alone the comparison should be made. From the same report it appears that $1,174,520,000 of the grand duplicate valuation was for realty, and $568,567,255 for personalty of every kind, tangible and intangible; and of this sum, all except $165,928,748 was for tangible and other personal property, not moneyed capital; and of the $165,928,748, $111,173,728 were credits, while only $9,676,374 were invested "in bonds, stocks joint stock companies, annuities or otherwise." In other words, this latter sum of $9,676,374, was all of the moneyed investments of the State outside of credits and investments in bank capital. We shall make this clear by a tabular statement from the official report on page 33 of this brief. If it be true, as stated by the learned judge delivering the opinion of the Supreme Court of Ohio, that $106,000,000—a misstatement of the aggregate amount of credits of 1893, as will hereinafter more particularly appear—is an insignificant part of $1,636,000,000, the question of discrimination between the $106,000,000 and the other "moneyed capital in the hands of individual citizens of the state," would have been much more enlightened by the comparison of the $106,000,000 with the $54,755,020, which was for that year the total amount of all moneyed capital in the hands of individual citizens of the state, exclusive of credits, but inclusive of all investments in bank shares.

The Court's reasoning leads to but one conclusion, and that is, if it established the fact that under the entire tax legislation of the state relating to both realty and personalty, and personalty of every kind, no injustice was done to National Bank shares, then, and in such case, the act of Congress was not violated, no matter what might be the particular relation, as to value, between credits, under the Ohio Statute, and other moneyed capital in the hands of individual citizens of the state.

We were not only subjected to this false comparison by the Court on the question of discrimination, but we were denied the right to avail ourselves of the presumption that there were any credits in Ohio in the year 1893 in excess of the alleged $106,000,000 from which deduction of debts was actually made. The Court at page 30 of the Record, in speaking of debts actually deducted in the state, says:

"The amount of debts so deducted has not been carried into the official record, and this Court has no means of knowing the amount as no finding was made of such amount by the Court of Common Pleas, and, therefore, for the purposes of the case, *the fact of such deduction does not exist.*"

In view of the legislation of the state this conclusion is somewhat remarkable. There is no requirement of the statute that the amount of debts deducted from the "legal claims and demands" of the owner shall be stated or exhibited. No report of the same is required. No method is prescribed for the ascertainment of the debts so deducted. Credits, after deductions are made, are returned for taxation. They are "the excess of all legal claims and demands over legal bona fide debts." The owner makes his own deduction and return, hence, there could be no official report on the subject. The bank had no possible means of knowing the amount of such debts, outside of bank loans and discounts, and could have offered no proof on the subject. No proof was available, except to call all the tax payers of Ohio as witnesses and prove by them the aggregate amount of debts taken from credits, yet the Court tells us because we did not make this proof, and secure a finding of the fact, that presumably there were no such deductions, and consequently no credits in the state, not actually returned. Refusing to take notice judicially of a fact incapable of proof, but which, all experience and observation declare to exist; refusing to recognize a presumption that unincorporated banks deduct their bills and accounts payable from their bills and accounts receivable although the statute expressly authorizes them to do so; that merchants and manufacturers, and private individuals carrying on vast business operations throughout the state, and necessarily requiring large credit, on the day preceding the second Monday of April in the year 1893, had any debts to deduct from their credits, or credits from which to make such deduction of debts. The Court shut its eyes to the most obvious of commercial facts. That the credits returned in Ohio during any year are but a small portion of the credits existing, is a fact of common knowledge among business men and one of which the Court should have taken judicial notice. Moreover, an examination of Volume 1, of the report of the Controller of the Currency to Congress in the year in which the Court announced its opinion (p. 656), exhibits the fact that National Banks in Ohio held $118,820,137 of loans and discounts all of which were credits under the

Ohio Statute; and the report of the Auditor of State actually examined by the Court to ascertain the credits returned and taxed for the year 1893. Page 318, *et. seq.* shows $50,000,000 of loans and discounts by state banks, all of which were credits, making a total of $168,820,137, in banks alone. From this source alone the Court had the means of knowing that a large amount of credits existed in Ohio over and above those actually returned for taxation, and must have been in fact deducted from debts under the statutory privilege so to do.

III.

Again, the court fell into a vital error, and placed itself into direct and sharp antagonism to this court, in holding that all the national banks had the right to ask under the act of Congress, is, that they be placed, as regards taxation, on an equality with State banks. This holding is at war not only with the act of Congress, but with repeated decisions of this Court. At page 29 of the opinion, the Court say,

"In this state both national and state banks are taxed under the same section, being section 2762, Revised Statutes, and in fixing the value of the shares, the bank deducts its debts from its credits, so that it pays taxes only on the net valuation. Unincorporated banks are taxed, in the same manner (?) by deducting debts from credits, so as to pay only on the net capital stock. By Section 2759 in the case of incorporated state banks after the deduction of debts from the credits are made, and the net value of each share of stock thus ascertained, the holder of such stock is compelled to pay taxes upon such value, and is not permitted to deduct his legal bona fide debts therefrom. In the case of unincorporated banks when the net value of the capital is ascertained, the bank pays the taxes thereon, and the several owners of the capital stock are not allowed to deduct any of their debts from their share of such capital. It is thus clear that moneyed capital invested in national banks is placed upon an exact equality with moneyed capital invested in state banks, and this is all that can be reasonably asked for national banks, in the absence of a showing to the effect that moneyed capital invested in state banks is unreasonably discriminated against. That there is no discrimination against capital invested in state banks, is so clear that no argument is required to establish the fact; and that capital invested in national banks is put upon an exact equality with capital invested in state banks is equally clear from the sections above referred to. It would therefore seem clear that there is no such discrimination against national bank shares as to give just ground for complaint."

As will be presently shown, it would be difficult to put into fewer words so many inaccurate statements of what sections 2762 and 2759 of the Ohio Statute provide.

We challenge the accuracy of this statement, in every feature of it, in what it says of the Ohio Statutes, and in its holding that the

shareholders of the plaintiff bank have no right to complain of a violation of rights secured to them by the act of Congress if no discrimination is made between national and state banks in the valuation of their shares for taxation.

We elsewhere refer to the decisions of this court that are expressly to the contrary of this mode of comparing valuations, as the test of discrimination.

We, however, notice in passing that under the original act, authorizing the organization of national banking associations, passed February 25th, 1863, (12 statutes at large, 668,) the state derived no authority to tax the shares of such banks. Power was first granted by the 41st Section of the act of 1864, (13 U. S. Statutes at large, p. 111.)

That act authorized the taxation of bank shares under three restrictions:

First.—Not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state.

Second.—That the tax so imposed under the laws of any state upon the shares of any of the associations authorized by the act, *should not exceed the rate imposed upon the shares of any of the banks organized under state authority.*

Third. Limiting the taxation of real estate owned by the bank to the same valuation as that fixed upon other real estate in the state where the bank was located.

By the amended act of 1868, the second of the above restrictions, namely: limiting the rate to that imposed upon the shares of banks organized under state authority, was omitted, leaving the statute in its present form, and therefore eliminating from the consideration of the question all comparison with the taxation upon shares of state banks, except as they were to be treated under the first restriction as moneyed capital in the hands of individual citizens of the state. This amendment shows very clearly the intention of Congress not to make the valuation of capital in state bank shares, the measure of the valuation of the shares of National Banks. If it had so intended it would have repealed the first limitation or restriction above recited, and permitted the second to stand. In the first place, the Court fell into a grave error in stating that under Section 2762 of the Revised Statutes of Ohio, which we recite below, and which relates only to incorporated banks, the state banks deduct their debts from their credits That section makes no reference to the matter of deduction and confers no such right. There is not a word in the section that justifies the statement. It also fell into a like error in supposing that Section 2759 has any reference whatever to incorporated banks. It relates wholly, as its terms show, to unincorporated banks and bankers.

It reads: "All unincorporated banks and bankers shall annually, between the first and second Mondays in May, make out and return to the Auditor of the proper county under the oath of the owner or principal officer or manager thereof, a statement setting forth:

"First. The average amount of notes and bills receivable, discounted, or purchased, in the course of business by such unincorporated bank, banker or bankers, and considered good and collectible.

Second. The average amount of accounts receivable.

Third. The average amount of cash and cash items in possession or in transit.

Fourth. The average amount of all kinds of stocks, and bonds including United States Government bonds, or evidences of indebtednesses held as an investment, or in any way representing assets.

Fifth. The amount of real estate at its assessed value.

Sixth. The average amount of all deposits.

Seventh. The average amount of accounts payable exclusive of current deposit accounts.

Eighth. The average amount of United States Government and other securities that are exempt from taxation.

Ninth. The true value in money of all furniture and other property not otherwise therein enumerated. From the aggregate sum of the first five items above enumerated, the said Auditor shall deduct the aggregate sum of the fifth, sixth, seventh and such portions of the eighth item as are by law exempt from taxation, and the remainder thus obtained added to the amount of Item 9 shall be entered on the duplicate of the county in the name of such bank, banker or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township."

This is the entire section. It makes not the slightest allusion to incorporated banks, and the Court was grossly mistaken in stating that it permitted deduction of debts from credits in that class of banks. It is quite true that State banks that are incorporated are taxed under the laws of Ohio as national banks are, but the capital invested in incorporated state banks is a very small amount when compared with the capital of national banks doing business in the state; and especially so, when compared with the credits actually returned for taxation, to say nothing of the vast amount from which deductions are actually made and of which no return is made. In *People* vs. *Weaver*, 100 U. S., 543, Mr. Justice Miller, speaking of the State of New York, said that "Nearly all banks in that state *and in all others*, are national banks."

Unincorporated banks and bankers are authorized by Section 2759 of the Ohio Statutes, *supra*, to deduct their debts from all legal claims and demands of every kind, including investments in bonds. They are also authorized to deduct their debts from investments in stocks of all kinds. The section requires by sub-division 4, the statement of the bank to the auditor to contain the average amount of all kinds of stocks and bonds, including United States Government bonds, or evidences of indebtedness held as an investment, or in any way representing assets. By the 9th sub-division of the section the auditor is required to deduct the debts of the bank from the amount invested in stocks and bonds, and other evidence of indebtedness, held as an investment, as well as to deduct the debts from bills and accounts receivable. By this section the debts of the bank are taken from the moneyed investments of every kind, a right withheld from incorporated state banks, as well as from national banks, thereby creating a discrimination in favor of private banks in direct violation of the principle of uniformity and equality of taxation prescribed by the Constitution of Ohio, and in further direct violation of Section 5219 of the Revised Statutes of the United States, and of the provision of the 14th amendment of the constitution of the United States, securing to the citizen the equal protection of the laws.

The taxable valuation in Ohio of the shares of incorporated state banks in 1893 was $6,462,613. The value of shares of national banks in the same year, was $37,506,418. The state bank shares being a little over one sixth in value of the shares of national banks, the valuation of the former is so small a percentage of the valuation of the latter as to make a comparison between the two classes of shareholders unjust to the shareholders of national banks, if no other moneyed capital was taken into account in determining whether the restriction provided by the act of Congress had been violated or not. Nor is it true, as stated by the State Supreme Court, that unincorporated banks, by the laws of Ohio, pay on the same valuation as national banks. This was a vital error, materially affecting the judgment of the Court. They pay on an entirely different valuation, one clearly discriminating against national banks. Unincorporated state banks are expressly authorized to deduct their bills and accounts payable from their bills and accounts receivable. Or, in other words their legal bona fide debts from their credits. The reading of Section 2759 above recited not only shows this to be true, but it was so held by the Supreme Court of Ohio in *Treasurer* vs. *Bank*, 47 O. S., 522. As respects incorporated banks, both national and state, the mode of valuation is entirely different from the valuation of the moneyed capital invested in unincorporated banks. Section 2762, above alluded to, and under which the Court mistakenly said "the bank deducts its debts from its credits," reads as follows:

"All shares of the stockholders in incorporated banks or banking associations located in this state whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed *at their true value in money*, and taxed in the city, or village where such bank is located and not elsewhere."

Section 2765 provides that,

"The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and second Mondays of May annually a report in duplicate under oath exhibiting in detail and under appropriate headings *the resources and liabilities* of such bank at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each and the par value of each share."

Section 2766 provides:

"Upon receiving such report the county auditor shall fix the total value of the shares of such banks *according to their true value in money*, deducting from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the State Board of Equalization for incorporated banks, a copy of the report so made

by the cashier, together with the valuation of such shares as so fixed by said auditor."

These sections require the shares to be assessed by the Auditor at their true value in money, without specifically directing how that value is to be ascertained. The bank makes no deduction of debts from credits. It is not authorized to fix any value. It simply makes return of its resources and liabilities, with the names and place of residence of the shareholders. The entire value is made up by the Auditor, and later equalized by the State Board of Equalization for banks to their *true value in money*, section 2809. The true value in money is to be ascertained with no provision for deduction as in unincorporated banks. Generally speaking, three things enter into the value of shares in all corporate bodies organized for profit: capital, surplus and franchise. Capital, surplus and the goodwill of the business make up the value of the shares. *Adams Express Co.* vs. *Ohio*, 166 U. S. 185. The value of the goodwill in banking is largely measured, and materially affected, by the amount of deposits. In so far, therefore, as the goodwill of the banking business enters into the value of national bank shares returned for taxation, there is a palpable and material discrimination between such value and the value fixed upon moneyed capital employed in private banking. No element of goodwill enters into the valuation of the latter. So, it is not true as the court below stated, that moneyed capital invested in national banks is placed upon an exact equality with money invested in state banks. Inasmuch as unincorporated banks are expressly authorized to deduct their debts from their credits in the valuation of the latter for taxation, which right of deduction is denied to incorporated banks, and inasmuch as every man in the state is authorized to enter into this kind of banking and possess himself of this privilege of exemption and thereby bring himself directly into sharp competition with national banks in carrying on his banking business, a marked discrimination against national bank shares results.

It matters not that at the present time an equal amount of money may not be employed in private banking. The laws of Ohio authorize any amount of capital to be invested therein. The fact of discrimination cannot be made to depend on whether in a given year more or less capital is employed in the banking business, the question always being what do the laws of Ohio allow. The taxation as authorized must not result in discrimination, and discrimination results when elements of value are excluded from the assessment in one class that are included in the other.

But if it were true that all state banks are placed on an exact equality with national banks, the conclusion reached by the Court, that consequently there is no discrimination made by the laws of Ohio

against national bank shares in favor of other moneyed capital, by no means follows. This was so declared by this Court in *Whitbeck* vs. *Mercantile Bank*, *supra*, with the whole legislation of Ohio on the subject before it. The fact appeared in that case, as clearly appears from the opinion, that banks incorporated and doing business under the laws of the state, and national banks, have their shares valued by the same rule. It was held, however, that this did not obviate the objection of discrimination. The question still remained whether outside of banking capital there was a discrimination between the valuation of national bank shares for taxation and other moneyed capital in the hands of individual citizens of the State. This clearly appears from the opinion of Mr. Justice Miller, a portion of which we give below. The certificate of division under which the Court received the case contained among other facts found the following:

1st. That moneyed capital other than that invested in shares of national banks in the hands of individual citizens of the City of Cleveland, and County of Cuyahoga, in which the complainant bank is located, was by the rule of valuation fixed by the taxing officers of said county and city valued for taxation in the year 1885 at 60% only of its true value in money.

2nd. That the auditor of Cuyahoga County in accordance with the provisions of Section 2766 of the Revised Statutes of Ohio, fixed *the total value of the shares of incorporated banks* at 60% of their true value in money in accordance with said rule.

Third. That the auditor of said county for the year 1885 in accordance with the rule and practice thereunder adopted for the valuation of other moneyed capital in the hands of individual citizens of the state and county aforesaid, fixed the value of the shares of said banks for said year at 60% of its true value in money and certified and transmitted the same to the annual state board of equalization for incorporated banks.

Fourth. That the Board of Equalization increased the value of the shares of complainant from 60% of their true value in money to 65% of their true value in money which latter value was certified to the auditor of Cuyahoga County, and by him placed upon the duplicate for said year and said duplicate was sent to the defendant, the treasurer of said county, for collection of the taxes thereon. That in the year 1885 the total value of the levy for all purposes in said county and city was twenty-six mills on the dollar valuation; twenty-three mills and six-tenths of which were deducted for county and state purposes and two mills and four-tenths state levy for such purposes. The same percentage of actual value was fixed by the county auditor ond by the state Board of equalization for incorporated banks upon the shares of incorporated banks of the state *both state and national.*"

Here was an express finding that national and state banks were treated alike in the valuation of their shares.

In answer to the claim that the state Board of Equalization for incorporated banks made a just estimate of the value of the shares throughout the state, Mr. Justice Miller, at page 105, says:

"It is probably the fact as alleged by the counsel for the treasurer that the state board having these stocks under consideration may have made a truer estimate and may have equalized their assessed value over the entire state, but this equalization from the very nature of the functions and powers of that body merely has reference to bank shares themselves; that is to say, its purpose is to make the capital stock of *all incorporated banks* in the state *equal in valuation*, for the purposes of taxation so far as relates to their actual cash value. This board has no other power than this. *It has no capacity to equalize the valuation of bank shares for taxation as compared with other moneyed capital in the state.* Such capital may, therefore, have a valuation very much below its real value, and very much below the conventional rate fixed on bank shares by the action of this body, and that result almost necessarily follows in this case from the nature of the powers which have been conferred upon it. While it has the power and it is made the duty to take the valuation of bank shares as reported to it by the auditor of Cuyahoga County and make a comparison between it and the reports of the same character made to it by the eighty-eight other counties in the state, it receives no report in regard to *any other moneyed capital.* There is no means furnished it for the purpose of making a comparison of the property which the assessment sustains to the true value as between the bank *and other moneyed capital of the state* in the different counties thereof."

These facts and the opinion upon them are a complete refutation of the holding of the Supreme Court of Ohio that equality between State and national bank shares, answers all the requirements of the act of Congress. The certificate of division on which the case was decided expressly declared both classes of stock to have the same valuation.

The judgment of the court was founded on the manifest insufficiency in amount of State bank capital compared with other moneyed capital, to be employed as a basis of comparison with national banks, under language declaring that national bank shares shall not "be taxed at a greater rate than other moneyed capital in the hands of individual citizens of the state." The principle asserted throughout, as stated in *Boyer* vs. *Boyer*, 113 U. S., 639, and approved, *Aberdeen Bank* vs. *Chehalis County*, 166 U. S., 453, is, that bank shares "may not be subjected to taxation where a very material part, relatively of *other* moneyed capital in the hands of individual citizens is exempt." No

matter how invested, the phrase is "other moneyed capital" and not "other bank capital."

In *Supervisors* vs. *Stanley*, 105 U. S., 305, a discrimination between the taxation of national bank shares and moneyed capital in the hands of individuals was held to exist under the New York statute, although national and state bank shares were both taxed alike. Had these cases been examined by the Supreme Court of Ohio, and their *ratio decidendi* discovered, it would not have held that the conditions of the act of Congress are complied with by treating shares in state and national banks alike, for the converse is definitely held by them.

IV.

But more conspicuous and complete evidence of ill advisement of what this court had in fact held on the question involved in the present controversy is shown by a remark of the Supreme Court of Ohio at page 327 of the report of the case, Record page 28. The Court say:

"No examination of the provisions of the Ohio Statute by the Court is found in the opinion in the *Whitbeck* case except as to the procedure in demanding deduction, and even as to that there is no examination shown by the Court, but the finding of the Circuit Court is accepted as to such provisions."

For the purpose of showing that all intimations by Court or counsel, that this Court had not the Ohio Statutes before it when the *Whitbeck* case was considered and decided, are without a shadow of foundation for their support, we place in the hands of the Court the bound volume containing the record and briefs of counsel in that case, from which it will be seen that the charge is utterly groundless, and without the slightest support in fact. Every section of the Constitution and laws of Ohio bearing on the question, nearly or remotely, was laid before this Court, thoroughly argued and carefully considered.

The charge seems the more ridiculous when we consider the exhaustive review of the Ohio scheme of assessment and valuation of property for taxation and bank taxation, under the same laws, given by the learned Justice delivering the opinion in the Whitbeck case, in giving the opinion of the Court in *Pelton* vs. *Bank*, and *Cummings* vs. *Bank*, reported in Volume 101 U. S. Reports, pp. 143-153. Moreover, Mr. Justice Matthews, presumably familiar with the tax laws of Ohio, from a long and close previous connection with their administration, and who was a member of the Court and present when the case was argued, participated in its consideration, and concurred in its decision and judgment: a fact showing that within the view of that learned Justice there was nothing in *Mercantile National Bank* vs. *New York*, 121 U. S. 138, inconsistent with the judgment pronounced. We

believe a better reason can be found for the criticism of the *Whitbeck* case by the Supreme Court of Ohio, than the one expressed. That Court was committed to a view of the law stated in the ill-considered case of *Niles* vs. *Shaw, Treasurer*, 50 O. S., 370. In that case the point decided as stated in the syllabus was as follows:

"Our tax laws do not authorize the deduction from the value of shares in a national bank entered on the duplicate for taxation of legal bona fide debts owing by the holder of such shares of stock."

By "our laws" the Court meant the laws of Ohio. This statement of the effect of the Ohio laws is undoubtedly correct. This Court in the *Whitbeck* case said the same thing, and *because of such fact* held, as stated in the head note of the case, thereby giving effect to the act of Congress:

"That the owners of such shares are entitled to have a deduction of their indebtedness made from their assets valued as in the case of other moneyed capital."

In *Niles* vs. *Shaw*, supra, the fact seems to have been entirely overlooked by the Court, that the right to tax National Bank shares and the extent to which the exercise of the right may be carried, are created by the act of Congress. For, in the report of that case, no reference whatever is made to the act of Congress, nor to any restriction upon the laws of Ohio in the National Bank act respecting the taxation of National Bank shares, nor to any decision of this Court giving construction to the act and defining the limits within which the right to tax National Bank shares may be exercised, although the Niles case was decided long after the *Whitbeck* case was reported.

Between these two cases, the Supreme Court of Ohio, when it came to consider the question in this case, in which attention was directed to both the act of Congress and the decisions under it had one foot on the sea and the other on the dry land; and in determining which of the two was ill considered, and therefore incorrectly decided, self-vindication required it to select the latter. Hence, the *Whitbeck* case was animadverted upon in the manner above stated. We leave the record in the *Whitbeck* case, to speak for itself, and to pronounce upon the accuracy of the statement of the Court below that the decision thereof was given without considering the Ohio Statutes.

V.

Another misconception that entered into the judgment of the Supreme Court of Ohio is shown by the following language of the Court found on page 28 of the Record:

"In the *Whitbeck* case, it is assumed by the Court, or at least recited in effect, that the Statutes of Ohio are in substance the same as the Statutes of New York, and permit a deduction of debts from the total amount of personal property, and *Hills* vs. *Exchange Bank*, 105 U. S., 319, is cited as authority for the holding."

There is not in the *Whitbeck* case, a sentence, phrase, word or syllable which justifies this statement. It is true that the Statute of New York permitted a deduction of indebtedness from the value of all personal property except shares of incorporated banks. The fact that deduction of debts was authorized by the New York Statute from the value of tangible personal property cut no figure whatever in the case. It was not even claimed in argument that deduction of debts from the value of bank shares would follow from the fact that debts were permitted to be taken from the value of tangible personal property; nor did the Court consider that fact as in anywise infringing the act of Congress. But the term "All personal property" used in the New York Statute, from the value of which debts could be deducted, embraced "moneyed capital in the hands of individual citizens of the state," and this being exempt from taxation to the extent that debts were taken from it, a discrimination against capital invested in national bank shares would result, unless a like deduction was allowed in its favor. The attention of the Supreme Court of Ohio was called to the fact that this court had held in the *Britton* case, 105 U. S., 322, that it was the exemption of moneyed capital from taxation by the New York Statute, and not tangible personal property, that violated the restriction of the act of Congress. In the *Britton* case, page 323, the Court, speaking of *Supervisor* vs. *Stanley*, and *Hills* vs. *Exchange Bank*, reported in the same volume, say: "The three cases were advanced out of their order and heard consecutively," showing the claims made in the three cases were fresh in the mind of the Court. To show that the exemption of moneyed capital from taxation was alone considered to be the source of trouble, we quote further from the opinion of Mr. Justice Miller:

"The objection made to the Indiana Statute is the same as that made against the New York Statute, viz: that it permits the tax payer to deduct from the sum of his credits, money at interest or other demands, the amount of his bona fide indebtedness, leaving the remainder as the sum to be taxed, while it denies the same right of deduction from the cash value of bank shares. A discrimination is attempted to be drawn between the Indiana Statute and the New York Statute, because the former permitted the deduction of the taxpayer's indebtedness to be made from the valuation of *his personal property*, while in Indiana he can only deduct it *from his credits*. And undoubtedly there is such a difference in the laws of the two states. But if one of

them is more directly in conflict with the act of Congress than the other, it is the Indiana Statute. In its schedule the subject of taxation from which the taxpayer may deduct his bona fide indebtedness is placed under two heads, as follows:

1. Credits or money at interest, either within or without the state at par value.

2. All other demands against persons or bodies corporate either within or without this state.

Total amount of all credits.

The act of Congress *does not make the tax on personal property* the measure of the tax on bank shares in the state, *but the tax on moneyed capital in the hands of the individual citizen.* Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation, without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way.

It is unnecessary to repeat the argument in *People* vs. *Weaver*, 100 U. S., 539, on this point. We are of the opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his bona fide indebtedness, as in the case of other investments of moneyed capital is a discrimination forbidden by the act of Congress."

In the light of the express declaration of this Court in the *Britton* case considered with the *Stanley* case, that the act of Congress does not make the tax on personal property the measure of the tax on bank shares in the state, but the tax on moneyed capital in the hands of the individual citizens, what becomes of the intimation of the Court below, that the tax on tangible personal property was considered by this Court in the *Whitbeck* case as the measure of the tax to be imposed on National Bank shares? The very cases cited to prove the statement clearly demonstrate its inaccuracy.

## VI.

We shall consider but one other statement of the Supreme Court of Ohio made as one of the predicates of its judgment. It was claimed by opposing counsel, and seemingly agreed to by the Court, that *The First National Bank of Garrett* vs. *Ayres*, 160 U. S. 660, controlled the present case instead of *Whitbeck* vs. *Mercantile National Bank*, because of the alleged similarity between the Kansas Statute, defining credits, and the Ohio Statute. At page 28 of the Ohio opinion, the judge says:

"The sections of the Kansas Statute under review in the Ayres case are almost identical with Sections 2730 and 2737 of our own state, and it would seem that the facts being the same, the same construction should obtain as to each."

There would be much force in this conclusion if this statement were true, or if credits under the Ohio Statute and in Ohio are as limited as they were held to be in Kansas by the Supreme Court of that state in the report of the Ayres case 53 Kansas, 457. It, however, is perfectly demonstrable that they are not. The Court there said:

"It would seem to have been the view of the Legislature that only those *unsecured* credits which were not in general investments for profit, but were in the ordinary course of honest dealing are *applied as soon as received to the extinguishment of current debts and obligations*, should be subject to the deduction, and that, in fact, such credits represented no capital whatever when there was a corresponding debt to the payment of which they of right should be applied."

The Court had already said, p. 459, that the principle declared in *Whitbeck* vs. *Mercantile National Bank, supra*, was, that there must not be a substantial discrimination against bank capital. It then said:

"The question of minor exemptions is a matter of state policy with which the Court will not interfere, and that when only some *minor or inconsiderable portions* of capital are relieved from the burden of taxation, the validity of taxes levied on National Banks will not be thereby affected."

If the Supreme Court of Ohio had carefully examined the Kansas Statute, and reflected for a moment upon one or two items of difference between the two statutes, it could not have said that they are nearly identical. Under the Kansas Statute, debts cannot be taken from credits secured by a lien on realty, nor from judgments, nor would it seem from promissory notes in view of the above holding of the Kansas Supreme Court, *that credits as soon as received were to be applied to the extinguishment of current debts.*

Section 6847 of the Kansas Statute defines credit "as meaning and including every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by a lien on real estate."

Section 6851 provides that "debts owing in good faith by any person, company or corporation, may be deducted from the gross amount of credits belonging to such person, company or corporation, provided such debts are not owing to such person, company or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in this state or elsewhere."

From this statute it appears that credits secured by vendors liens, or other equitable liens, or by mortgage on real estate, are not subject to deduction; nor are judgments. In *Dutton* vs. *Citizens National Bank of Concordia*, 53 Kansas 444, the Court said the law provided "that all corporate stocks, all money secured by judgment or lien on real estate, and substantially *all moneyed capital of every description, invested for profit*, shall be subject to taxation *without deduction of indebtedness*." This is entirely variant from the laws of Ohio. According to the Federal Census of 1890. (See report eleven, on Mortgage debts, Volume entitled "Real estate mortgages", and "The Mortgage debt of the United States", page 94, account of mortgage indebtedness given by Counties, page 735), there was in Kansas a mortgage indebtedness January 1, 1890, on farm and city property, of $243,146,826, not a dollar of which was a credit. In Ohio, according to the same report, page 94, the state at large, and by counties, page 742, the mortgage debt on farm lands, village and city lots amounted to $259,842,108, every dollar of which was a credit subject to the deduction of debts. *Myers* vs. *Seaburger*, 45 O. S., 232. The amount due on land contracts in Ohio is also a credit. *Reinboldt* vs. *Raine*, 52 O. S., 160. Not so in Kansas. If opposing counsel question the correctness of these census figures, we will lay the report before the Court. We suppose this mode of proof and reference entirely proper, in view of the fact that the act of Congress of February 22, 1890, Volume 26, page 13, Laws of the United States, 89-91, requires the superintendent of the census "to ascertain the number of farms and homes which are under mortgage, and the amount of the mortgage debt of the United States, and the value of the property mortgaged." The same volume, page 880, contains an act providing among other things, that 5,000 copies of each of the following final volumes shall be printed: one on "Wealth, debt and taxation", and one on "Recorded indebtedness". It is from the last named volume that we obtain the amount of the mortgage indebtedness in Kansas and Ohio. The facts shown by these reports are moreover facts of which the Court takes judicial notice. In the Dutton case above cited from Kansas, page 460, the Court say:

"We do do take judicial notice of the fact that debts secured by liens on real estate, money invested in corporate stocks of all kinds and descriptions including railroad, banking, insurance, loan and trust companies, constitute the great bulk of the moneyed capital in this state."

This Court in *Whitbeck* vs. *The Mercantile National Bank*, took judicial notice that credits in Ohio, embracing as they do mortgage indebtedness, and all other indebtedness secured by lien on real estate as well as all judgments, and every conceivable chose in action, except

municipal and company bonds, constitute such a material and substantial part of the moneyed capital of the state as to require money invested in National Bank shares to be placed on an equality with them in the mode of their valuation for taxation. Is it for a moment to be supposed that the Supreme Court of Kansas would have held the mortgage indebtedness of that state to be so insignificant as to amount only to what the Court called a "minor exemption," had the statutes of that state declared it to be a credit? It is a matter of public history that that state is burdened with an enormous mortgage debt amounting to vastly more than all other money investments therein. And it is a well known fact that mortgage investments in the middle and western states are investments of moneyed capital for interest and profit upon the investment.

Another difference between the Ohio and the Kansas statute relates to money deposited in savings banks. In Ohio, such deposits, requiring as they do a time notice before withdrawal, are credits of the depositors. The Statute of Ohio defining credits, expressly includes deposits in banks or with individuals other than such as are held to be money. To be money, they must be subject to order. The Kansas statutes, Section 6851, provides:

"Debts owing in good faith by any person, company or corporation, may be deducted from the gross amounts of credits belonging to such person, company, or corporation *provided* such debts are not owing to such person, company or corporation as depositors in any bank or banking association, or with any person or person or firm engaged in the business of banking in this state or elsewhere."

This provision embraces certificates of deposit as well as all other deposits. The report of the auditor of the state of Ohio which the Supreme Court of Ohio resorted to for its figures for the taxable valuation of the property referred to in the finding, at page 336, shows that deposits in one savings bank in the city of Cleveland, the Society for Savings, amounted in 1893 to $21,915,350.81, all of which is subject to deduction of the debts of the depositors in fixing their value for taxation, a sum more than double the amount of all moneyed investments in Ohio outside of that invested in bank shares. I am aware that the Court held in Mercantile National Bank vs. New York 121, U. S., 138, that a statute authorizing exemption from taxation of savings deposits is not in conflict with the national bank act because of the character of the investment. Hence I only make reference to these deposits as showing in Ohio they are credits while in Kansas they are not. But there is another very matural difference between the Kansas statute and the Ohio statute, relating to credits from which debts may be deducted in their assessment for taxation.

Building and loan associations are corporations organized in Ohio for the purpose of raising money to be loaned among its members and depositors. They are organizations for profit by loaning money as fully as are banks, and the shares of non-borrowing members are taxed as credits, the value of which is made up by deducting therefrom the indebtedness of the shareholders.

Section 3636–2 provides that "the capital stock named in the Articles of Incorporation shall be deemed to refer to the authorized capital and the organization which may be completed and business commenced when five per cent. thereof is subscribed."

Section 3636–3. "Such corporations shall have power" (inter alia) "To receive money on deposit from time to time to the extent necessary to meet the demands of its members and depositors, but shall not pay interest thereon exceeding the legal rate, to issue stock to members on such terms and conditions *as the Constitution and By laws may provide;*

"To borrow money not exceeding twenty per cent. of the assets and issue its evidence of indebtedness therefor."

"To make loans to members and depositors on such terms, conditions and securities *as may be provided in the Constitution and By-laws.*" * * * * * * * * * * * * * * * * * * * *

To make such annual or semi-annual distribution of the earnings after paying expenses and setting aside a sum for the reserved fund as hereinafter provided as the Constitution and By-laws may prescribe.

To increase or decrease its authorized capital, or the face value of the shares at any time by a majority vote of the Board of Directors.

To provide by constitution, adopted by its members and By-laws adopted by its Board of Directors for the proper exercise of the powers herein granted and the conduct and management of its affairs, and all such powers as are necessary and proper to enable such corporation to carry out the purpose of its organization."

Section 3836–4 provides that "the officers of such association who have charge and possession of money, securities or property shall give bond before entering on their duties to the satisfaction of the Board of Directors for the faithful performance of the same and the safe keeping and proper application of all money or property coming into their hands."

Section 3836–6 provides, "a portion of the earnings to be determined by the Board of Directors shall also be reserved annually or semi-annually for the payment of contingent losses as provided in Section 5 of this act and the residue of such earnings *shall be transferred as a dividend annually, or semi-annually, in such proportion to the credit of the members as the corporation by its Constitution and By-laws may be provided,* to be paid to them at such time and in such manner in

conformity with this act as the corporation by its Constitution and By-laws may provide."

We have not quoted all the provisions of this act, but a sufficiency to enable the Court to see that power is given to do a quasi-banking business by borrowing money and loaning the same to members and depositors. If an outsider desires a loan, all he has to do is to become a depositor in a small sum.

Section 3836-7 provides for the taxation of shares as follows:

"The shares and loans advanced to its members shall be exempt from taxation, except, shares or stock upon which no loans have been made, or money advanced, by the company, shall be considered and held as credits, and the said members individually shall return for taxation the number of shares held by them and the true value thereof in money on the day preceding the second Monday in April in each year, and the same shall be assessed at such valuation for taxation and taxes as other property."

The Act of May 8, 1886, 83 O. L., p. 116 provided, that stock or shares of individual members or depositors of such corporation, shall be considered and held as credits.

By the act of April 13, 1889, 86, O. L., p. 293, the law was changed to its present reading. The section was re-enacted May 1st, 1891, vol. 88, O. L., p. 471, with no change in the phraseology relating to taxation.

By the "full and detailed official report" of May 1st, 1894, of the inspector of building and loan associations of Ohio, of the affairs and business of each association which section 2836-16 of the Revised Statutes of Ohio requires to be made each year showing the financial condition for the preceding year, it appears at page 11,

"That on the 31st day of December, 1893, there were in Ohio 765 associations * * * . The tables in this report cover the business done by 741 associations with a total authorized capital of $721,179,500, of which there was subscribed and in force $281,460,205.32. These 741 associations had a total of depositing members of 183,983; borrowing members, 68,903 and a total membership of 252,886."

A detailed tabular statement made on page 58-9 of the report shows for 1893,

| | |
|---|---|
| Total number of shares of stock in force at close of associations' fiscal year ending in 1893 | $1,122,688 |
| Total number upon which loans have been made | $308,465 |
| The percentage of borrowing to total membership | 27.2 |
| Dividend distributed to running stock | $2,786,053.27 |
| Dividends distributed to paid-up stock | $990,080.64 |
| Average rate of interest charged borrowed | 6.13 |
| Average rate of dividends declared | 6.22 |
| Average loans on mortgage security for each of the 741 associations | $92,401.39 |
| Average loans on other security for each association | $6,339.04 |
| Total | $98,706.43 |

These figures show, in connection with the Statute under which the business is carried on, that the moneyed capital invested in these associations is invested for profit by the use of money, *as interest*, and that cash dividends, exceeding in amount the usual bank dividends, are paid to shareholders; they further show that loans made by the 741 associations amounted in the year 1893 to $73,187,478.63, of the accumulations on which they received and distributed over 6% in dividends to shareholders; further the nature and character of the business show the investments of the shareholders to be of "moneyed capital in the hands of individual citizens" within the meaning of that term as employed in Section 5219 of the Revised Statutes of the United States.

It appears that 73% of the shareholders or owners of the paid in capital, being non-borrowers, are required to return their shares for taxation as credits, the value of which was ascertained by the deducting from the value thereof, their legal bona fide debts. The amount of capital subscribed and in force in 1893, amounted to $281,460,015.32, 73% of which, taxable as credits, amounted to the sum of $205,465,803.88. This amount of moneyed capital in Ohio was in the year 1893, invested in business carried on under the authority conferred by statute, with the sole object to loan the same for profit, and its owners were expressly authorized, when returning the same for taxation to deduct from the value of their shares all legal bona fide debts by them owing. To deny the same right to the owners of national bank shares would, we respectfully submit, be a gross and palpable discrimination against capital invested in such shares.

In *Mercantile Bank vs. New York*, 121 U. S. 121, it was said:

"That the terms of the act of Congress includes shares of stock or other interests owned by individuals *in all enterprises* in which the capital employed in carrying on its business *is money*, where the object of the business is the making of *profits by its use as money*. The moneyed capital thus employed is invested *for that purpose in credits by way of loans*, discount or otherwise which are from time to time according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way *invested in loans or in credits for the payment of money* either as an investment of a permanent character *or temporary with a view to selling and repayment and reinvestment*."

In *Palmer vs. McMahon*, *135* U. S., 667, in speaking of moneyed capital it was said:

"It embraces capital employed in National Banks and capital employed by individuals when the object of their business is the making of profits by the use of their moneyed capital as money?"

This is what building and loan associations in Ohio are organized for, and the result of their business shows large profits realized purely

from the investment of moneyed capital as money. That the legislature regarded shares in building and loan associations the same as bank shares as respects their income producing function is evident from the fact that the shares in each are taxed to the stockholders, while no other corporate shares are taxed at all, except partially through the medium of taxing the corporate property. We have deemed it proper to review the grounds of the decision of the Supreme Court of Ohio, and the argument in support thereof, with a view of showing that the decision rests throughout on false premises and unsound reasoning, and therefore that its conclusions and judgment are necessarily erroneous. We now examine into the amount of moneyed capital actually returned for taxation in the year 1893.

## VII.

## STATEMENT OF CREDITS AND OTHER MONEYED CAPITAL IN OHIO FOR 1893, SHOWING THE FORMER TO BE MORE THAN DOUBLE THE LATTER.

By the official report of the auditor of the state of Ohio, for 1893, copies of which we place before the court, referred to by the Supreme Court of Ohio, and which, it was agreed by counsel, the court might judicially notice, it appears that the moneyed capital invested in credits was more than double the amount of all other moneyed investments in the state.

Section 2737 of the Revised Statutes of Ohio, requires the statement of property returned for taxation so far as it relates to money or moneyed capital or investments to set forth:

"12th. The value of the property which such person is required to list as a banker, broker or stock jobber.

13th. Moneys on hand or on deposit subject to order.

14th. The amount of credits as hereinbefore defined.

15th. The amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise.

16th. The monthly average, amount or value for the time he held or controlled the same within the preceding year, of all moneys, credits or other effects within that time invested in or converted into bonds or other securities of the United States or of this state not taxed to the extent he may hold or control such bonds or securities on said day preceding said second Monday of April, and any indebtedness created in the purchase of said bonds or securities shall not be deducted from the credits under the 14th item of this section."

These provisions cover all investments in moneyed capital.

We here give a statistical summary of the report of the auditor of state for 1893, of all property listed in the state for taxation:

## STATISTICAL SUMMARY OF THE REPORT OF THE AUDITOR OF STATE OF OHIO FOR 1893.

| *Tangible Personal Property in State.* | *pp.* | *Assessed Valuation.* |
|---|---|---|
| Merchants' stock | 223 | $43,124,298 |
| Manufacturers' stock | 223 | 17,540,253 |
| Money in possession or on deposit subject to order | 223 | 41,560,576 |
| Horses | 217 | 44,160,679 |
| Cattle | 217 | 22,312,002 |
| Mules, etc. | 217 | 1,004,070 |
| Sheep | 219 | 9,289,942 |
| Hogs | 219 | 5,331,283 |
| Carriages | 219 | 5,535,874 |
| Watches | 220 | 1,857,268 |
| Pianos and organs | 220 | 5,017,901 |
| Dogs | 225 | 76,587 |
| All other personal property not named | 221 | 39,576,428 |
| Railroad property | 293 and 305 | 106,323,762 |
| Express, telephone and telegraph companies | 345 | 5,022,778 |
| Other corporation property (total on p. 225 less the two foregoing items and bank shares) | | 37,611,784 |
| Total | | $385,345,485 |

## INTANGIBLE PROPERTY IN STATE RETURNED FOR TAXATION.

| | | |
|---|---|---|
| Credits after deducting *bona fide* debts (p. 223) | | $111,173,728 |
| Banker, broker or stock jobber (p. 223) | $ 505,084 | |
| Bonds, stocks, annuities or otherwise (p. 225) | 9,676,374 | |
| National Bank shares (p. 313) | 37,506,418 | |
| State Bank shares (p. 317) | 6,462,613 | |
| Average value of property converted into nontaxable securities (p. 225) | 604,531 | |
| | | 54,755,020 |
| Excess of credits over all other moneyed capital | | $ 56,418,708 |
| Total value of all personal property returned by township assessors (p. 227) | | $551,274,233 |
| Total value of personal property on duplicate (p. 198) | | 568,567,255 |
| Ergo-value added by auditors | | 17,897,553 |
| Real estate in cities and villages 198 | | 597,848,119 |
| Real estate not in cities and villages 198 | | 586,575,556 |
| Personal property 198 | | 568,567,255 |
| 1893 total valuation 198 | | $ 1,752,990,930 |

| | |
|---|---|
| Take out moneyed capital or investments proper, and separately state it, we have invested in banks, state and national | $43,969,331 |
| "Invested in bonds, stocks, joint stock companies, annuities and otherwise" | 9,672,374 |
| Amount returned by banker, broker and stock jobber | 505,084 |
| Add average value of property convertible into non-taxable securities | 604,533 |
| Making a total of | $54,755,020 |

Which, taken from $111,173,728, credits, leaves $56,418,708 more of credits than of all other moneyed investments in the state including money invested in bank shares, and as before said; more than double all other moneyed capital; the very *excess* of which over all investments in other moneyed capital, more than equals the entire amount of the latter. If we add to the sum of all moneyed investments, exclusive of credits, all money in possession and on deposit for the year 1893 in the state, amounting to $41,590,576.00 the sum total falls short

of equaling the amount of credits by $13,164,424. The credits returned and taxed also exceeded the taxable value of the entire railroad property of the state, and but a few dollars short of three times the amount of the valuation of all other corporate property of the state. Notwithstanding this showing and the fact that presumably a large amount of credits existed from which debts were actually taken, in making lists for taxation, we are told in a solemn opinion, that the Statutes of Ohio do not allow a deduction equal to the bona fide debts to be made from the amount of the assessments of moneyed capital in general, *but only "from a small and comparatively insignificant* amount of moneyed capital, called credits."

The Supreme Court of Ohio agrees that credits are moneyed capital, but seems unwilling to concede that $111,173,728 of moneyed capital is a significant sum compared with $54,755,020 of other moneyed capital returned for taxation. In *Whitbeck* vs. *The Mercantile National Bank*, *supra*, the Court held "That an increase of *eight and one-third per cent.* of the valuation of National Bank shares over the valuation of other moneyed capital, was a discrimination prohibited by the act of Congress." It appeared in that case that National Bank shares were valued for taxation at 65 per cent. of their actual value, while other moneyed capital was valued at 60 per cent. This difference in the valuation of the two classes of property was held to violate the act of Congress inhibiting discrimination, and the collection of the tax on the increase was enjoined. Here over two-thirds of the entire amount of all the moneyed capital of the state, and more than three times the amount invested in National Bank shares, are subject to exemption through deduction of indebtedness. If the owners of the $111,173,728, credits returned, had owed debts to that amount, the state would have realized no tax upon any portion of that sum, and the result would have been a large increase of the tax on National Bank shares to supply the deficiency; and if we were authorized to go outside of moneyed capital proper, as that term has been defined for the purpose of comparison with other moneyed investments, we would find an equally marked inequality in other items.

Investments in stocks in domestic corporations are expressly exempted from taxation by statute. By the laws of Ohio, Section 2744 of the Revised Statutes—all domestic corporations, except railroad, express, telegraph, telephone, insurance companies, and banks, are required to return to the auditor of the county wherein is their principal office, their capital for taxation. And by Section 2746 it is expressly provided:

"That no person shall be required to list for taxation any share or shares of the capital stock of any company the capital stock of which is taxed in the name of said company."

"Capital Stock," as used in this section, was held in *Davis* vs. *Jones*, 35 O. S., 474, to mean capital. Hence the valuation of bank shares for taxation at their actual value in money, which is determined from the value of the capital, surplus and franchise, while share owners in other corporations only pay through the company on the valuation of the capital of the company, is clearly a discrimination against capital invested in national bank shares. It is also an especial violation of the constitution of Ohio which explicitly requires equality and uniformity of taxation as respects all classes of property.

To summarize some of the foregoing claims we have $111,173,728 of taxable credits returned for 1893 and actually taxed, as against $54,755,020 of all other moneyed capital including money invested in banks.

We have a large amount of credits from which debts are actually deducted. The above amount of credits exceeds the entire valuation of all the railroad property in the state, and is nearly three times the amount of all other taxable corporate property, exclusive of the capital of banks. It is more than three times the amount invested in national banks. We have a marked and material discrimination between the valuation of national bank shares, and capital invested in private banks and in favor of the private banks. We have two hundred millions of moneyed capital invested as money for profit in building and loan associations, the shares of which are taxed but not until after deduction from their value of all legal bona fide debts of the owner.

A few further references and we draw the discussion to a close.

In *Boyer* vs. *Boyer*, 113 U. S., 695; referring to the cases of *People* vs. *Weaver*, 100 U. S., 534, *Pelton* vs. *National Bank*, 101 U. S., 143, *Cummings* vs. *National Bank*, 101 U. S., 153, *Supervisors* vs. *Stanley*, 105 U. S., 305, *Evansville Bank* vs. *Britton*, 105 U. S., 323; the Court speaking by Mr. Justice Harlan, say: "In *Pelton* vs. *National Bank* it was held, that any system of assessment of taxes which exacts from the owner of shares of a National Bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the act of Congress."

"From these cases may be deduced certain rules for the construction of that act:

1. That the words 'at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens refer to the entire process of assessment, which, in the case of National Bank shares, includes both their valuation and the rate of percentage on such valuation.

2. That a state law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than National Bank shares, or *which permits* the taxpayer

to deduct *from the sum of his credits, money at interest*, or *other demands to the extent of his bona fide indebtedness*, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital."

The Court, in language not to be misunderstood, condemns every attempt to evade the restrictions imposed by the act of Congress. It further says in the same case:

"These decisions show that, in whatever form the question has arisen, this Court has steadily kept in view the intention of Congress not to permit any substantial discrimination in favor of moneyed capital, in the hands of individual citizens, as against capital invested in the shares of national banks. In *People* vs. *Weaver*, the Court said:

"As Congress was conferring a power on the states which they would not otherwise have had to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against that class of property as compared with other moneyed capital. In permitting the states to tax these shares, it was foreseen that the states might be disposee to tax the capital invested in these banks oppressively. This might have been prevented by fixing a limit on the amount. But Congress, with due regard to the dignity of the states, and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of the public burdens, said: 'You may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner, to the same extent you tax *other moneyed capital invested in your state*.' It was conceived by this qualification of the power of taxation, equality would be secured and injustice prevented."

In *Mercantile Bank* vs. *New York*, 121 U. S., 138, the holding in *Evansville Bank* vs. *Britton*, *supra*, was distinctly approved, as will be seen from an extract from the opinion given below. That was not a case involving the question of the right to deduct debts from credits under the laws of New York. That right was conceded. The statement of the case, page 144, of the report, shows that debts of various stockholders amounting to $89,128 were deducted from the value of their shares. The question involved was a broader one, whether the mode of taxation adopted by the statute of New York in reference to its domestic corporations, other than trust companies and savings banks, did not operate in such a way as to make the tax assessed upon shares of National Banks greater than that imposed upon other moneyed capital in the hands of individual citizens. This question was answered in the negative, and while the Court said that the main purpose of fixing limits to state taxation on investments in shares of National Banks was to render it impossible for the state in leving such tax to

create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of like character, in defining "similar business and operations and investments of like character," it expressly embraced credits of the kind defined by the Ohio Statute. The Court speaking by Mr. Jusitce Matthews at page 157 says:

"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way *of loan, discount, or otherwise*, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, *invested in loans*, or *in securities for the payment of money*, either as an investment *of a permanent character*, or *temporarily with a view to sale or repayment and reinvestment*. In this way the moneycd capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it is said in *Evansville Bank* vs. *Britton*, 105 U. S., 322: "The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the state, but the tax on moneyed capital in the hands of the individual citizens. *Credits, money loaned at interest*, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemptions, because personal property is not necessarily moneyed capital. But the *rights, credits, demands, and money at interest*, mentioned in the Indiana statute, from which bona fide debts may be deducted, *all mean moneyed capital invested in that way*. This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

There was a large amount of moneyed investments which under the Indiana statute were not embraced in the term "credits." In *Wasson Treasurer* vs. *The First National Bank Indianapolis*, 107 Ind. 206, it is held:

"Under the tax law of 1881 (Indiana) a taxpayer may deduct his bona fide debts from all his moneyed capital and credits, *except* money on hand or on deposit, money loaned, *bonds, and shares of stock in corporations;* and the Courts will take judicial notice of the fact that the moneyed capital from which the taxpayer may so deduct his debts is a material portion of the whole moneyed capital of the state."

The term "money loaned" was held to mean money loaned "on call," making it equivalent to money on deposit. The Indiana statute excluded from the denomination of credits, bonds and shares of stocks in corporations. The Ohio Statute only excludes from the denomination of credits investments in bonds, issued by the state or some of its subdivisions, and companies, and investments in stock. In Ohio, a bond of an individual is a credit. So that in any view that can be taken credits in Ohio exceed in value and kind, credits in Indiana, but otherwise are very similar in character. To hold Ohio credits are not moneyed capital in the hands of individual citizens requires the overruling of the Britton case, as well as the Whitbeck case, and as well the rejection of the principle on which *Boyer* vs. *Boyer*. *Supervisor* vs. *Stanley*, and *Hill* vs. *Exchange Bank* were decided.

The following state cases are in entire accord with *Whitbeck vs. The Mercantile National Bank; Wasson Treas. vs. The First National Bank of Indianapolis*, 107 Ind. 206; *Equitable Life Ins. Co. vs. Board of Equalization*, 74 Iowa, 181-270; *Miller vs. Heilborn*, 58 Cal.; *Ruggles vs. The City of Fond du Lac*, 53 Wis., 436; *Maguire vs. Board of Revenue*, 71 Ala., 401; *McAdem vs. Commissioners*, 97 N. C., 555.

The fact is not to be overlooked that ten years have elapsed since the rendition of the judgment in the Whitbeck case and that the legislature of Ohio with full knowledge of the rule there laid down, has permitted the Ohio Statute relating to credits and all others bearing on the subject to remain unchanged in any particular, thereby evincing entire satisfaction with the rule declared and the practice under it. The statute of Ohio defining credits, has been in force nearly fifty years, and its constitutional validity, once questioned, has been recently affirmed by the Supreme Court in *Treasurer* vs. *Bank*, 47 O. S., 522; it was there held that the taxable credits of an unincorporated bank were to be determined by deducting its bona fide debts from its legal claims and demands.

The overruling of *Whitbeck* vs. *Mercantile Bank* would, moreover, have a singular and an unjust effect among the national banks in Ohio; it would result in creating a discrimination in favor of the shareholders of certain banks whose right to the deduction of their bona fide debts has been established by adjudication as against those who were permitted to exercise the right without objection and who consequently are without a judgment in their favor.

At the term of the Circuit Court for the Northern District of Ohio, at which judgment was given to the Mercantile National Bank enjoining Whitbeck as Treasurer and his successors in office from collecting the disputed tax, a like judgment was given in favor of seven other national banks of Cleveland, and by the state court a like judgment was given to other national banks, the amount in controversy in

the latter cases being below the requisite sum to confer jurisdiction on the Federal Court. These judgments are in full force and operation. The laws, both state and national, under which they were given, remaining the same, the questions decided by them have passed, *in rem judicatem*; and within the recent holding of this court in *New Orleans* vs. *Citizens' Bank*, 167 U. S., 371-387, and in *S. P. R. R. Co.* vs. *W. S.*, 168 U. S., 48, the banks having these judgments in their favor have only to plead them to establish the right of their shareholders to the deduction, whenever such right is drawn in question. The banks heretofore enjoying the same right without having been required to establish it by suit, would be denied the privilege enjoyed by the Cleveland banks solely through the effect of such adjudication. The overruling of the Whitbeck case, therefore, would necessarily work manifest injustice to the smaller banks throughout the state, and in effect fritter away the just restriction upon the taxation of national bank shares found in the act of Congress by which the right of the state to tax them at all, is created.

Respectfully submitted,

W. W. BOYNTON,

*Solicitor for the Plaintiff in Error.*